

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1053 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

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SURAPSING JEhariya VASAVA

Versus

STATE OF GUJARAT

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Appearance:

MR PN BAVISHI for Petitioner

PUBLIC PROSECUTOR for Respondent No. 1

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CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 07/07/1999

#### ORAL JUDGEMENT

Appeal admitted. In the facts and circumstances  
of the case, the matter is taken up for final hearing.  
The Record and Proceedings was called for from the Trial  
Court by order dated 16.6.99. The R&P is before this  
Court.

2. The appellant challenges the judgement and order  
rendered by the Additional Sessions Judge, Bharuch  
camping at Rajpipla, in Sessions Case No. 77/93

recording conviction of the appellant under Section 436 of the IPC and sentencing rigorous imprisonment for four years with fine of Rs.250/- and to undergo further imprisonment in default of payment of fine.

3. The prosecution story in short is that one Lilaben Vishnubhai lodged a complaint on 9.3.93 against the present appellant stating that the accused appellant went to her place and demanded liquor and as she refused to give, he threatened to take away her daughter Babita and when the complainant asked him not to say so he got annoyed and set to fire the hut used by the complainant as her dwelling house. She therefore went to Sagbara Police Station and lodged the FIR. Offence was registered by the Sagbara Police Station being CR No. I 13/93, the case was investigated and the chargesheet was filed. The prosecution has examined 2 witnesses, the complainant herself i.e. Lilaben at Exh.7 and the complainant's daughter Babita at Exh.9. No other witness is examined.

4. Mr.Bavisi, Learned Advocate appearing for the appellant has submitted that the Learned Additional Sessions Judge has committed an error in placing reliance on the deposition of the complainant and the the FIR. According to the FIR when the incident occurred the complainant herself, her daughter Babita and 2 other persons were present. The prosecution has examined the complainant and her daughter Babita and has chosen not to examine the other two witnesses who could have thrown more light on the incident. The complainant's daughter Babita has not supported the prosecution of the case and therefore the case rests on the deposition of the complainant Lilaben. Mr.Bavisi's case is that Lilaben's deposition even if taken on the face value cannot establish nexus between the crime and the accused and therefore the appeal deserves to be allowed.

5. Mr.Trivedi, Learned APP appearing for the respondent State has opposed this appeal.

6. On perusal of the record and proceedings and the impugned judgement, it is clear that the prosecution case hangs on the deposition of Lilaben at Exh.7. Her deposition, if seen, even the examination in chief does not directly or specifically implicate the accused and during cross-examination she admits candidly that the hut caught fire some time after the accused had left. There are certain other contradictions and additions also between her deposition and the FIR. It is therefore very unsafe to place reliance on such deposition and convict a

person. This aspect is overlooked by the Trial Court while delivering the judgement.

7. It also transpires from the judgement that reliance is placed by the Learned Judge on an averment in the FIR which implicates the accused categorically. The Learned Judge slipped into the error of accepting a statement made in the FIR not supported by the deposition. The FIR is not substantive piece of evidence and cannot be looked into for recording a conviction.

8. Thus recording of conviction on sole testimony of the complainant which does not implicate the accused even indirectly, leave aside categorically cannot be sustained.

9. The only other witness examined is daughter of the complainant Babita. If her deposition is seen she says that Surapsing had come to their place and demanded liquor and had threatened to take her away and thereafter went into the house and set it to fire but she then says that Surapsinh is not present in the Court meaning thereby that she could not identify the accused and therefore her version could not have been accepted. Even the prosecution has with the permission of the Court declared her as a hostile witness and cross-examined her.

9. The Investigating Officer is not examined and therefore even the contradiction have not been properly proved. In light of these circumstances, the Learned Additional Sessions Judge has committed a clear error in convicting the accused appellant for offence under Section 436 of the IPC and sentencing him to undergo rigorous imprisonment for 4 years and to pay fine of Rs.250/- and to undergo further imprisonment of 7 days in case of default of payment of fine. The appeal therefore deserves to be allowed and hence the following order:-

#### O R D E R

The appeal is allowed. The judgement and order impugned in this judgement rendered by the Additional Sessions Judge, Bharuch in Session Case No. 77 of 1993 dated 27.8.98 is hereby quashed and set aside. The appellant is in jail and he shall be released forthwith. The fine if paid be returned to the appellant. Direct Service of the operative part be given to the appellant.

(A.L.Dave, J)

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